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SEP 15 1950
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 309

THE BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

THE PENNSYLVANIA-READING SEASHORE LINES, a New Jersey Railroad Corporation, and THE NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF

LESTER A. DRENK,
Attorney for Petitioner.

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Respondents.

PETITION FOR CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of The Brotherhood of Railroad Trainmen, respectfully shows:

A

Summary Statement of the Matter Involved

The respondent, The Pennsylvania-Reading Seashore Lines, is a corporation organized under the laws of the State of New Jersey, for the purpose of operating a railroad for the common carriage of passengers and freight in the southern part of New Jersey. In the pursuit of its business, it engages in interstate commerce although its lines lie wholly in the State of New Jersey. Among other lines which it owns and operates, is a branch line extending

from Woodbury, New Jersey, where it has a junction with the main line from Camden to Millville to the terminal point of the branch line at Pennsgrove, New Jersey, its length being 20.3 miles. Until the decision of the Supreme Court of New Jersey in this matter, it operated a rail motor car for the carriage of passengers daily, except Saturday and Sunday, and also used the line for freight trains.

On July 22, 1949, the railroad company notified the Board of Public Utility Commissioners of the State of New Jersey that commencing September 25, 1949, it would withdraw all passenger service on that branch. The Board ordered the railroad company to show cause why its passenger service should not be continued and, following a hearing on September 12, 1949, the Board, on the authority of *O'Connor* v. *Board of Public Utility Commissioners,* 129 N. J. L. 263, 29 Atl. 2d 390 (decided by the Court of Errors and Appeals of New Jersey on December 3, 1942), ordered the railroad company to continue to furnish passenger service on that branch. The appeal of the railroad company from this order to the Superior Court of New Jersey, Appellate Division, was affirmed. *Pennsylvania-Reading Seashore Lines* v. *Board of Public Utility Commissioners,* 6 N. J. Super. 388, 71 Atl. 2d 386 (decided February 14, 1950).

The Supreme Court of New Jersey, with two Justices dissenting, reversed, holding that the order requiring the railroad to continue to furnish passenger service, and therefore that portion of the Railroad Act (Revised Statutes of New Jersey, 1937, 48:12-99, N. J. S. A., 48:12-99) as construed by the case of *O'Connor* v. *Board of Public Utility Commissioners,* 129 N. J. L. 263, 29 Atl. 2d 390, deprived the railroad of its property in violation of the due process clauses of the State and Federal Constitution and placed an undue burden on interstate commerce. *Pennsylvania-Reading Seashore Lines* v. *Board of Public Utility Commissioners,* 5 N. J. 114, 74 Atl. 2d 265 (decided June

19, 1950). The petitioner appeared before the Board of Public Utility Commissioners on September 12, 1949, and opposed the proposed action of the railroad company and it was the only party who defended the appeals to the Superior Court of New Jersey, Appellate Division, and the Supreme Court of New Jersey.

B

Reasons Relied Upon for the Allowance of the Writ

1. The Supreme Court of New Jersey has erroneously construed the "due process of law clause" of Section 1 of the Fourteenth Amendment to the Constitution of the United States and the "interstate commerce clause" of Clause 3, Section 8, Article I of the Constitution of the United States and has erroneously determined that the order of the Board of Public Utility Commissioners of the State of New Jersey under review in this case is violative of the clauses of the Constitution of the United States aforementioned.

C

Prayer for Writ

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New Jersey, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket, *Pennsylvania-Reading Seashore Lines* v. *Board of Public Utility Commissioners, et al.*, No. 510; that said judgment of said Supreme Court of New Jersey be reversed by this Honorable Court, and that your peti-

tioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper; and your petitioner will ever pray.

All of which is submitted this thirteenth day of September, 1950.

LESTER A. DRENK
Attorney for Petitioner

State of New Jersey }
County of Burlington } ss.:

JAMES M. DAVIS, JR., of full age, being duly sworn according to law, on his oath disposes and says:

I am a member of the Bar of the Supreme Court of New Jersey and I am the attorney who actually conducted the defense of the appeals referred to in the foregoing petition on behalf of the Brotherhood of Railroad Trainmen. I aver that I have read the foregoing petition and that the allegations of fact therein contained are true.

JAMES M. DAVIS, JR.

Sworn to and subscribed before me this }
13th day of September, 1950. }

EVELYNE E. RIDGWAY
Notary Public of New Jersey

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The order of the Board of Public Utility Commissioners of the State of New Jersey, which is under review in these proceedings, is predicated upon Revised Statutes of New Jersey, 1937, 48:12-99, N. J. S. A. 48:12-99, which provides in part that "Every railroad company shall start and run trains *for the transportation of persons and property*";* "Every railroad company shall furnish sufficient accommodations for the transportation of *all such passengers and property** as shall" * * * "be offered * * * at usual stopping places established for receiving way *passengers and freight* for that train"; and "The company shall take, transport and discharge *such passengers and property** at and from and to such places, * * *." The Court of Errors

* Italicism—ours.

and Appeals of New Jersey, which until September 15, 1948, when the Judicial Article of the New Jersey Constitution of 1947 took effect, was the Court of Last Resort in the State of New Jersey, in *O'Connor* v. *Board of Public Utility Commissioners,* 129 N. J. L. 263, 29 Atl. 2d 390 (decided December 3, 1942), decided that Revised Statutes of New Jersey, 1937, 48:12-99, N. J. S. A. 48:12-99, was a part of a contract existing between a railroad company and the State of New Jersey by virtue of which a railroad company as long as it desired to exercise its franchise, must exercise it both for the carriage of passengers and freight and that it must exercise its franchise or surrender it. It held that the duty of the railroad was a "double duty of carriage, on the one hand of freight, and on the other hand of passengers". *O'Connor* v. *Board of Public Utility Commissioners,* 129 N. J. L. 263, 267, 29 Atl. 2d 390, 392. It also held that the Board of Public Utility Commissioners was without power or authority to waive the requirement of passenger transportation which the Legislature, by its solemn act, had secured for the benefit of its people. It was upon the basis of this decision that the Board of Public Utility Commissioners ordered the continuance of passenger train service by the Pennsylvania-Reading Seashore Lines in this case and upon the basis of that decision that the Superior Court of New Jersey, Appellate Division, affirmed the order. In reversing both the judgment of the Superior Court of New Jersey, Appellate Division, and the order of the Board of Public Utility Commissioners, the Supreme Court of New Jersey in the majority opinion, posed three questions: 1. Should the *O'Connor* case be overruled as being unsound; 2. Does the order of the Board of Public Utility Commissioners deprive the railroad of its property in violation of Article I, Paragraphs 1 and 20 of the New Jersey Constitution and the Fourteenth Amendment to the Federal Constitution; and 3. Does the order of the Board place an undue burden on interstate commerce in violation of Article I,

Section 8, Clause 3 of the Federal Constitution. The Supreme Court of New Jersey was of the opinion that all three of its questions must be answered affirmatively. *Pennsylvania-Reading Seashore Lines* v. *Board of Public Utility Commissioners,* 5 N. J. 114, 118, 74 Atl. 2d 265, 267. While on its face it would appear that this cause could have been decided by the Supreme Court of New Jersey on the law of the State of New Jersey independently of any construction of the Constitution of the United States. Actually and in fact that was not done. The majority opinion in discussing the first question indicates that there were a number of pertinent facts of the railroad act which had not been considered by the Court of Errors and Appeals at the time the *O'Connor* case was decided. While it is true that a number of these statutes were not cited by the Court in its opinion, the briefs indicate that these questions had all been argued to the Court. However after considering these various points, the Supreme Court of New Jersey in the last analysis relied upon a construction of the due process clause and of the commerce clause of the Constitution of the United States which together were the real coup de grace in so far as the overruling of the *O'Connor* case was concerned, for the Court said at page 121 of the opinion in the official report and at page 268 of the Atlantic Reporter, "This conclusion becomes inescapable when the two constitutional questions hereinbefore posed come to be considered, for in the view we take of each of them (to be dealt with later in this opinion) the statute as construed in the *O'Connor* case would be unconstitutional. Obviously that construction of the statute is to be preferred which would save it from being struck down as being violative of our fundamental law. But this reasoning is also controlling when the practical aspects of the problem here presented are considered. * * * (Continuing on page 123 of the official report and on page 269 of the Atlantic Reporter) "In addition to the several reasons hereinbefore mentioned for overruling the *O'Connor*

case, there is an especial reason for holding that the suggested doctrine should not apply here: In the *O'Connor* case the constitutional issues now presented to us were not raised, briefed or argued by counsel or considered by the court save in the dissenting opinion."

The second question posed by the Court below is on its face one which is constitutional in character. Here again contention might be made that the lower Court though erroneous in its decision of the federal question, could have decided this cause on the basis of the Constitution of New Jersey alone. We will demonstrate that not only was this not done but that it could not have been done.

The third and final question posed by the lower Court is on its face one which involves solely the construction of the Constitution of the United States.

The learned Supreme Court of New Jersey misconstrued both the due process of law clause as it appears in the Fourteenth Amendment to the Constitution of the United States and the interstate commerce clause of the Constitution of the United States in determining the issues involved in this cause. The learned Court at page 124 of the official report and at page 270 in the Atlantic Reporter, said, "If the O'Connor case were upheld, we would nevertheless be constrained to vacate the order of the Public Utility Commissioners in the instant case, since it violates Article I, Paragraphs 1 and 20 of the New Jersey Constitution and the Fourteenth Amendment to the Federal Constitution." It declined to follow a well defined path already prepared by this Court in such cases as *Chesapeake & Ohio R. Co.* v. *Public Service Commission of West Virginia,* 242 U. S. 603; *Missouri, Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262; *Atlantic Coast Line R. Co.* v. *North Carolina Corporation Commission,* 206 U. S. 1, and *Hurley* v. *Commission of Fisheries of Virginia,* 257 U. S. 223. In the humble opinion of counsel, the Supreme Court of New Jersey con-

fused two other lines of cases with the line immediately cited heretofore. It confused the line of cases represented by *State of Iowa* v. *Old Colony Tr. Co.*, 215 Fed. 307 (U. S. C. A. 8, 1914); *Railroad Commission of Texas* v. *Eastern Texas R. Co.*, 264 U. S. 79, and *Brooks Scanlon* v. *Railroad Commission*, 251 U. S. 396, on the one hand, which hold that a state may without violating the due process of law clause of the Federal Constitution require a railroad to operate at a loss and to desist from total abandonment proceedings. It also confused another line of cases represented by *Atlantic Coast Line R. Co.* v. *Public Service Commission of South Carolina*, 77 Fed. Supp. 675 (U. S. D. C. Eastern District of South Carolina, 1948); *Delaware, L. & W. R. Co.* v. *Van Santvoord*, 232 Fed. 978 (U. S. D. C. Northern District of New York, 1916) and others, which held that the operation of more than a bear minimum of passenger service at a loss could not be required by a state without depriving the railroad of its property without due process of law. These two lines of cases, we believe, the learned Court below confused with the line represented by *Chesapeake & Ohio R. Co.* v. *Public Service Commission of West Virginia*, 242 U. S. 604 and the kindred cases cited with it above which hold that where a railroad corporation is required as a condition to the grant of a charter to operate a normal amount of passenger service daily, its being required to continue that operation at a loss does not amount to a deprivation of property without due process of law, and with *Hurley* v. *Commission of Fisheries of Virginia, supra*, which held that a corporation cannot accept the benefits of a franchise and complain that the performance of its duties amount to a taking of its property without due process of law.

This Court has jurisdiction *in limine* of the petition for a writ of certiorari despite any contention that the decision is supportable on an independent state ground. *Abie State Bank* v. *Weaver*, 282 U. S. 765, 75 L. Ed. 690, 51 S. C. 252.

The next question that arises is as to whether or not the Supreme Court of New Jersey in addition to deciding the Federal questions, decided this cause on a state ground broad enough to support the judgment. We say that it did not and that any discussion of purported state grounds was merely a beclouding of the real fact that the decision rested upon a construction of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the commerce clause of the Constitution.

Reserving for later consideration the third question posed by the Court below dealing solely with the commerce clause, if the remainder of the Court's opinion be examined, this Court will find that on every point discussed by the Supreme Court of New Jersey the reasoning of the Court ultimately gravitated to a construction of the Fourteenth Amendment to the Constitution of the United States. The first point made by the Court below was that *O'Connor* v. *Board of Public Utility Commissioners,* 129 N. J. L. 263, should be overruled. It should be overruled, said the Court, because certain provisions of the New Jersey Railroad Act were not called to the attention of the Court of Errors and Appeals and further because the constitutional issues, both State and Federal, raised in the Supreme Court of New Jersey, were not presented to the Court of Errors and Appeals. It is interesting to note parenthetically that the *O'Connor* case was decided upon the authority of an earlier decision of the Court of Errors and Appeals, *National Docks and N. J. Junction Connecting Ry. Co.* v. *The United N. J. R. R. & Canal Co., et als.,* 53 N. J. L. 217 (decided 1890) (see *O'Connor* v. *Board of Public Utility Commissioners,* 129 N. J. L. 263, 265, 29 Atl. 2d 390, 391) and that the Supreme Court of New Jersey while overruling the *O'Connor* case, did not overrule the aforementioned decision on which it was based. Neither did it overrule *McCran, Attorney-General* v. *Public Service Ry. Co.,* 95 N. J. Eq. 22, 122 Atl. 205 (Ct. of Ch., 1923)

which was based upon *Brooks Scanlon Co.* v. *Railroad Commission*, 251 U. S. 396; *Atlantic Coast Line R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, decided by this Court. Mr. Justice CASE, in his dissenting opinion (*Pennsylvania-Reading Seashore Lines* v. *Board of Public Utility Commissioners*, 5 N. J. 114, 135), said, "Every question presented on this appeal was considered by the Court of Errors and Appeals in the determination of *O'Connor* v. *Board of Public Utility Commissioners*, 129 N. J. L. 263 (E. & A., 1942), and also specifically mentioned either in the opinion of the Court or in the dissenting opinion filed with respect thereto. That decision is on all fours with the facts and the law of this case and is squarely against the contention of the appellant here." "The especial reason" for overruling the *O'Connor* case were the determination of the constitutional questions.

The learned lower Court next turned to the matter of "due process" and for due process the Court referred specifically to the Fourteenth Amendment to the Constitution of the United States and Article I, Paragraphs 1 and 20 of the Constitution of New Jersey. A consideration of *Chesapeake & Ohio R. Co.* v. *Public Service Commission of West Virginia*, 242 U. S. 603; *Missouri, Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262; *Atlantic Coast Line R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1; *Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510; *Brooks Scanlon Co.* v. *Railroad Commission*, 251 U. S. 396, conclusively demonstrates that in so far as its application of the Fourteenth Amendment to the Constitution of the United States by the lower Court is concerned, it was clearly erroneous. The references to the New Jersey Constitution did not furnish any independent state ground. Article I, Paragraph 1 of the New Jersey Constitution provides: "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquir-

ing, possessing and protecting property, and of pursuing and obtaining safety and happiness." Paragraph 20 provides: "Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners." This paragraph embraces the same concept of due process as was contained in its predecessor, Paragraph 16 of Article I of the New Jersey Constitution of 1944. Due process under the New Jersey Constitution is and has been judicially declared to be identical with the same concept in the Fourteenth Amendment to the Federal Constitution. *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504, 179 Atl. 117, 124. See also *Grasso* v. *Board of Adjustment*, 137 N. J. L. 587, 61 Atl. 2d 167. Nowhere in the lower Court's discussion of the matter of due process does it cite or rely upon any decisions of the State of New Jersey, or, for that matter, upon the decisions of any of the sister states but its reliance and authority is based solely upon the decisions of this Court interpreting the Constitution of the United States except for two inferior Federal Court decisions which are cited and relied upon. We submit that on the authority of *State of Minnesota* v. *National Tea Co.*, 309 U. S. 551, 60 S. C. 676, on the phases of the case heretofore discussed, a writ of certiorari should be granted.

There remains for discussion only the question of whether or not the order of the Board of Public Utility Commissioners is violative of the commerce clause of the Constitution of the United States. This is clearly and solely a federal question. The lower Court concluded that the statute as applied by the Board of Public Utility Commissioners following *O'Connor* v. *Board of Public Utility Commissioners*, supra, did violate the commerce clause of the Federal Constitution. Without, at this time, embarking upon a detailed discussion of the authorities, we submit that there is a *prima facie* showing of error on this

point as well. The majority opinion in the Court below relied upon *C. B. & Q. Ry.* v. *Railroad Commission of Wisconsin,* 237 U. S. 20. That case was one involving the constitutionality of a statute requiring a railway company to stop two of its passenger trains each way daily at the station of Cochran and this Court held that the statute as applied to the facts of that case violated the commerce clause of the Federal Constitution. At page 234 of the opinion, the Court pointed out that a contention had been made that the statute was valid as an amendment to the charter of the railway and while this Court dismissed the contention because it appeared not to have been raised below, it indicated that, if true, it would have been an answer to the contention of unconstitutionality as a violation of the commerce clause. If there ever were any doubt about this it has since been revolved by this Court in *Hurley* v. *Commission of Fisheries of Virginia,* 257 U. S. 223, 42 S. C. 83, in which this Court held that a party could not both assail and rely upon a statute in the same proceeding. Here the railroad company must rely upon Revised Statutes of New Jersey, 1937, 48:12-99, N. J. S. A. 48:12-99, as its authority to operate any trains whatsoever. It assails the constitutionality of so much of the statute as requires it to operate passenger trains. Clearly the Supreme Court of New Jersey was in error in this as it was on the other points of the case and this Court should assume jurisdiction of the cause by writ of certiorari.

Respectfully submitted,

LESTER A. DRENK,
Attorney for Petitioner.

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BRIEF OPPOSING GRANTING OF WRIT OF CERTIORARI.

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Respondents.

BRIEF OPPOSING GRANTING OF WRIT OF CERTIORARI.

The New Jersey Supreme Court in its opinion stated the facts (fully supported by the record) as follows:

On July 22, 1949 the respondent Railroad gave notice to The New Jersey Board of Public Utility Commissioners that commencing September 25, 1949 it would withdraw all passenger service on its Penns Grove Branch. The Penns Grove Branch, 20.3 miles in length, running from Woodbury to Penns Grove, is virtually paralleled by a Public Service bus route. The Board ordered the Railroad to show cause why the proposed discontinuance would not constitute a violation of its obligation to provide passenger service and why such service should not be ordered continued. On

September 12, 1949 a public hearing was held by the Board on the Order to Show Cause. At this hearing, of which due notice was given as directed by the Board, no passengers of the Railroad appeared to object, the only opposition to the discontinuance of passenger service coming from the representatives of labor unions, members of which would be affected by a cessation of service.

The uncontroverted evidence at the hearing showed that the daily number of passengers (excluding Saturdays and Sundays) during the period from January 1 to August 31, 1949 averaged 6.2 on Train No. 828, and 8.1 on Train No. 829. During this period the total revenue derived from such passenger service was $767.13 while the total out-of-pocket cost of operations was $9,262.28. An exhibit of the financial results of the operations of both passenger and freight service on all of respondent's rail lines disclosed that with the exception of the war years 1943-1944, each year from 1934 to 1946 resulted in an operating deficit. The deficit for the first half of 1949 was $3,371,275, and for the year 1948 was $4,195,386. The balance sheet of the Railroad for December 31, 1948 showed an accumulated deficit of $37,379,107.

The Board of Public Utility Commissioners found that

> "In our opinion the evidence wholly fails to support a finding that public convenience and necessity require continuance of passenger train operation on the Penns Grove Branch between Woodbury and Penns Grove. The continuing deficits experienced in the operation of the branch and the entire system of the Pennsylvania-Reading Seashore Lines jeopardize essential services performed by the utility. Continued operation of non-essential service at a substantial continuing loss, particularly where as here another means of reasonably convenient public transportation is available, is, in our opinion, not justified as in the public interest."

Despite this unequivocal finding, the Board, considering itself bound by the decision of the New Jersey Court of Errors and Appeals in *O'Connor* v. *Board of Public Utility Commissioners,* 129 N. J. L. 263, ordered the operation of Trains No. 828 and 829 continued. An appeal was taken to the Appellate Division of the Superior Court, which affirmed the order of the Board solely on the grounds of the *O'Connor* case. On appeal to the New Jersey Supreme Court it was contended:

(1) That the *O'Connor* case should be overruled as being unsound;

(2) That the order of the Board of Public Utility Commissioners deprived the Railroad of its property and amounted to confiscation of its property in violation of Article I, paragraphs 1 and 20 of the New Jersey Constitution as well as the Fourteenth Amendment to the Federal Constitution;

(3) That the order of the Board placed an undue burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Federal Constitution.

The New Jersey Supreme Court, in an opinion by Chief Justice Vanderbilt (5 N. J. 114-142, decided June 19, 1950) held that under the guise of regulation the property of a railroad may not be taken for public use without just compensation by requiring it to furnish unnecessary services or facilities to serve the public. It held that:

(1) The decision in the *O'Connor* case, *supra,* was unsound and it was overruled;

(2) That it was the legislative intent as expressed in the Public Utilities Act of the State of New Jersey to give the Public Utility Board the power to permit a total discontinuance of passenger service when the

public convenience and necessity no longer requires such service;

(3) That the order of the Board of Public Utility Commissioners in the instant case violates Article I, paragraphs 1 and 20 of the New Jersey Constitution, and the Fourteenth Amendment of the Federal Constitution. The New Jersey Supreme Court in this respect said:

> "If the service sought to be withdrawn is not required by the public convenience and necessity, the railroad cannot be constitutionally required to render the same, regardless of whether the discontinuance be partial or entire. To so require, in either circumstance, would constitute an arbitrary and unreasonable taking of property for private purposes and without compensation, a violation of the 'due process' provisions of our State and Federal Constitutions."

(4) Finally, the Supreme Court held:

> "In view of the unquestioned absence of local need and the wholly unnecessary financial burden placed upon the Railroad's interstate operations, it is difficult to see how it can be held that the order of the Board herein is other than an arbitrary, unreasonable and thereby illegal interference with interstate commerce."

We have been unable to find in the petition for writ of certiorari and brief in support thereof any reference to the determinative facts, namely (1) that the Board of Public Utility Commissioners found as a fact that there was no public necessity or convenience for the passenger service sought to be discontinued, and (2) that the Railroad was and has been operating at terrific losses and that the passenger service on this particular Branch was unwanted and that the Branch had been and is operating at a loss.

POINT I.

In view of the decision of the State Court that the order of the Board of Public Utility Commissioners violated the State Constitution no federal question is presented to this Court.

The New Jersey Constitution of 1941, Article I, paragraph 1, provides:

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Paragraph 20 provides:

> "Private property shall not be taken for public use without just compensation."

The New Jersey Supreme Court expressly held that the order of the Board of Public Utility Commissioners in this case violated these two paragraphs of the New Jersey Constitution, 5 N. J. p. 118.

It is well settled that this Court lacks *jurisdiction* whether by way of appeal or certiorari, to review any state court judgment which may be rested upon a sufficiently broad non-federal ground and which does not, in its operation or effect, impair a federal right. *Superior Court of California* v. *Lillefloren*, 335 U. S. 906 (1949); *Lynch* v. *New York, ex rel. Pierson*, 293 U. S. 52 (1934).

In the *Lillefloren* decision this Court said in its *per curiam* opinion:

> "It appearing that there is a non-federal ground, independent of the federal ground, and adequate to

support the judgment of the lower court, the case is dismissed for want of jurisdiction. *Fox Film Corp.* v. *Muller*, 296 U. S. 207, *Lynch* v. *New York*, 293 U. S. 52."

POINT II.

Will this Court review the judgment of the highest court in New Jersey holding that the State Board of Public Utility Commissioners has statutory authority to permit the discontinuance of passenger service on a branch railroad line when there is no public necessity or convenience therefor?

In essence what the petitioners here seek is an order overruling the judgment of the New Jersey Supreme Court and restoring the overruled decision of the Court of Errors and Appeals in *O'Connor* v. *Board of Public Utility Commissioners*, 129 N. J. L. 263.

The Supreme Court of New Jersey in the opinion under review, in overruling the decision of the *O'Connor* case, held that the Board of Public Utility Commissioners did have authority, denied by the decision in the *O'Connor* case, to permit the discontinuance of passenger service on a branch line of a railroad where there was no public necessity or convenience therefor. This was a decision construing a state statute. The Supreme Court went further and held that on the undisputed facts of the case to deny to a railroad the right to discontinue passenger service on a branch line that was being operated at great loss, and where the entire railroad was operating at a deficit amounted to a confiscation or taking of its property by the public without just compensation under the State Constitution, and operated as a denial of due process of law under the Fourteenth

Amendment of the Federal Constitution, and further operated as an unreasonable burden on interstate commerce.

It was the Railroad, not the Brotherhood whose constitutional rights were denied by the order of the Board of Public Utility Commissioners. It is submitted that the petitioner here has no constitutional right to have a railroad which as an entirety is, and has been, operating at a deficit compelled to operate unwanted passenger service on a branch line at continuing and increasing deficits merely to provide positions for the workmen employed on the trains.

It is respectfully submitted that the petition for writ of certiorari should be denied.

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